

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

DEMOCRACY FORWARD FOUNDATION
1333 H St. NW
Washington, DC 20005,

Plaintiff,

v.

CENTERS FOR MEDICARE & MEDICAID
SERVICES
7500 Security Blvd.
Baltimore, MD 21244,

Defendant.

Case No.

COMPLAINT

1. Plaintiff Democracy Forward Foundation brings this action against Defendant the Centers for Medicare & Medicaid Services (“CMS”) to compel compliance with the Freedom of Information Act, 5 U.S.C. § 552 (the “FOIA”). Defendant has failed to sufficiently respond to Plaintiff’s FOIA request for records that relate to CMS’s decisionmaking concerning Affordable Care Act enrollment outreach. Plaintiff therefore respectfully requests that the Court compel Defendant to comply with the FOIA.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

3. Venue is proper in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391(e)(1).

PARTIES

4. Plaintiff Democracy Forward Foundation is a not-for-profit organization incorporated under the laws of the District of Columbia and based in Washington, D.C. Plaintiff works to promote transparency and accountability in government, in part by educating the public on government actions and policies.

5. Defendant CMS is a federal agency within the meaning of the FOIA, *see* 5 U.S.C. § 552(f)(1), that is headquartered in Baltimore, Maryland. CMS has possession, custody, and control of records to which Plaintiff seeks access.

FACTUAL ALLEGATIONS

6. On June 21, 2019, Plaintiff sent a FOIA request to CMS concerning CMS's decisionmaking on Affordable Care Act enrollment outreach. Plaintiff requested the following categories of records from CMS:

1. All correspondence and communications, including attachments, between Brian Colas (Chief of Staff, CMS) and Seema Verma (CMS Administrator), from Jan. 20, 2017 to the date the search is conducted, containing any of the following search terms: enrollment, econometric, model, channel, tactic, lessons, learnings, results, marketing, outreach, ad testing, Special Enrollment Period, SEP, data matching, media, TV, television, budget, spend or DMI.
2. All correspondence and communications, including attachments, between Brian Colas and Mary Wallace (Deputy Director, Office of Communications, CMS) from Jan. 20, 2017 to the date the search is conducted, containing any of the following search terms: enrollment, econometric, model, channel, tactic, lessons, learnings, results, marketing, outreach, ad testing, Special Enrollment Period, SEP, data matching, media, TV, television, budget, spend or DMI.
3. All correspondence and communications, including attachments, between Brian Colas and Chris Koepke (Director, Strategic Marketing Group, Office of Communications, CMS) from Jan. 20, 2017 to the date the search is conducted, containing any of the following search terms: enrollment, econometric, model, channel, tactic, lessons, learnings, results, marketing, outreach, ad testing, Special Enrollment Period, SEP, data matching, media, TV, television, budget, spend or DMI.

4. All correspondence and communications, including attachments, between Seema Verma and Mary Wallace, from Jan. 20, 2017 to the date the search is conducted, containing any of the following search terms: enrollment, econometric, model, channel, tactic, lessons, learnings, results, marketing, outreach, ad testing, Special Enrollment Period, SEP, data matching, media, TV, television, budget, spend or DMI.
5. All correspondence and communications, including attachments, between Matt Lloyd, Special Assistant, Principal Deputy Assistant Secretary for Public Affairs, and Mary Wallace, from Jan. 20, 2017 to the date the search is conducted, containing any of the following search terms: enrollment, econometric, model, channel, tactic, lessons, learnings, results, marketing, outreach, ad testing, Special Enrollment Period, SEP, data matching, media, TV, television, budget, spend or DMI.
6. All correspondence and communications, including attachments, between Matt Lloyd and Brian Colas, from Jan. 20, 2017 to the date the search is conducted, containing any of the following search terms: enrollment, econometric, model, channel, tactic, lessons, learnings, results, marketing, outreach, ad testing, Special Enrollment Period, SEP, data matching, media, TV, television, budget, spend or DMI.
7. All correspondence and communications, including attachments, between Matt Lloyd and Chris Koepke, from Jan. 20, 2017 to the date the search is conducted, containing any of the following search terms: enrollment, econometric, model, channel, tactic, lessons, learnings, results, marketing, outreach, ad testing, Special Enrollment Period, SEP, data matching, media, TV, television, budget, spend or DMI.
8. All correspondence and communications, including attachments, between Randy Pate (Deputy Administrator and the Director, Center for Consumer Information and Insurance Oversight, CMS) and Seema Verma, from Jan. 20, 2017 to the date the search is conducted, containing any of the following search terms: enrollment, econometric, model, channel, tactic, lessons, learnings, results, marketing, outreach, ad testing, Special Enrollment Period, SEP, data matching, media, TV, television, budget, spend or DMI.
9. All correspondence and communications, including attachments, between Randy Pate and Brady Brookes, Deputy Administrator and Deputy Chief of Staff, from Jan. 20, 2017 to the date the search is conducted, containing any of the following search terms: enrollment, econometric, model, channel, tactic, lessons, learnings, results, marketing, outreach, ad testing, Special Enrollment Period, SEP, data matching, media, TV, television, budget, spend or DMI.
10. All correspondence and communications, including attachments, between Randy Pate and Chris Koepke, from Jan. 20, 2017 to the date the search is conducted,

containing any of the following search terms: enrollment, econometric, model, channel, tactic, lessons, learnings, results, marketing, outreach, ad testing, Special Enrollment Period, SEP, data matching, media, TV, television, budget, spend or DMI.

11. All correspondence and communications, including attachments, between Randy Pate and Mary Wallace, from Jan. 20, 2017 to the date the search is conducted, containing any of the following search terms: enrollment, econometric, model, channel, tactic, lessons, learnings, results, marketing, outreach, ad testing, Special Enrollment Period, SEP, data matching, media, TV, television, budget, spend or DMI.
12. All correspondence and communications, including attachments, between Brady Brookes and Mary Wallace, from Jan. 20, 2017 to the date the search is conducted, containing any of the following search terms: enrollment, econometric, model, channel, tactic, lessons, learnings, results, marketing, outreach, ad testing, Special Enrollment Period, SEP, data matching, media, TV, television, budget, spend or DMI.
13. All correspondence and communications, including attachments, between Brady Brookes and Seema Verma, from Jan. 20, 2017 to the date the search is conducted, containing any of the following search terms: enrollment, econometric, model, channel, tactic, lessons, learnings, results, marketing, outreach, ad testing, Special Enrollment Period, SEP, data matching, media, TV, television, budget, spend or DMI.

7. Plaintiff sought a waiver of search and duplicating fees under 5 U.S.C.

§ 552(a)(4)(A)(iii), which requires a fee waiver if the disclosure is “in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.”

8. On June 26, 2019, CMS acknowledged having received Plaintiff’s FOIA request on June 24, 2019, and having assigned it control number 062520197001.

CLAIM FOR RELIEF

Count One (Violation of the FOIA, 5 U.S.C. § 552)

9. Plaintiff repeats and incorporates by reference the foregoing paragraphs as if fully set forth herein.

10. As of the date of this Complaint, Defendant has failed to produce all records requested by Plaintiff in its June 24, 2019 FOIA request or to demonstrate that such records are lawfully exempt from production. Nor has Defendant notified Plaintiff of the scope of any responsive records it intends to produce or withhold and the reasons for any withholdings, or informed Plaintiff that it may appeal any adequately specific adverse determination.

11. By failing to respond to Plaintiff's request within the statutorily prescribed time limit, Defendant has violated its duties under the FOIA, including but not limited to its duties to conduct a reasonable search for responsive records, and to produce all responsive, reasonably segregable, non-exempt information.

12. Plaintiff is being irreparably harmed by Defendant's violation of the FOIA, and Plaintiff will continue to be irreparably harmed unless Defendant is compelled to comply with the FOIA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

1. order Defendant to conduct searches for any and all records responsive to Plaintiff's FOIA request and demonstrate that it employed search methods reasonably likely to lead to the discovery of records responsive to Plaintiff's FOIA request;
2. order Defendant to produce, by a date certain, any and all non-exempt records responsive to Plaintiff's FOIA request and a *Vaughn* index of any responsive records withheld under a claim of exemption;
3. enjoin Defendant from continuing to withhold any and all non-exempt records responsive to Plaintiff's FOIA request;
4. order Defendant to grant Plaintiff's request for a fee waiver;

5. grant Plaintiff an award of attorneys' fees and other litigation costs reasonably incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and

6. grant any other relief this Court deems appropriate.

Dated: August 9, 2019

Respectfully submitted,

/s/ John T. Lewis

John T. Lewis (D.C. Bar No. 1033826)

Javier M. Guzman (D.C. Bar No. 462679)

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